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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1976

No. 76-1080

LAWRENCE L. DAIGLE,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF KANSAS

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STATE OF KANSAS,

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Lawrence L. Daigle, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas entered November 6, 1976, affirming his conviction under K.S.A. 65-4127(a), and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas (App. A, pg. 1) is reported at 220 Kan. 639.

An opinion of the District Court of Sedgwick County, Kansas, overruling the defendant's Motion for Withdrawal of a Jury Waiver (App. A, pg. 7) is not reported. The Journal Entry of the District Court is printed in App. A, pg. 17.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered on November 6, 1976. Motion for Re-hearing, which was allowed out of time was filed, and was denied on January 26, 1977. This Court has jurisdiction under 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED

1. Whether the denial of petitioner's Motion for Withdrawal of Jury Waiver, filed thirteen (13) days before his non-jury trial, was an abuse of the trial court's discretion, and thus in violation of his rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT, SEC. 1

§1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In a trial to the Court, petitioner was convicted in Sedgwick County District Court on May 30, 1975 on a charge of possession of heroin. This was the fourth trial on this charge. Two jury trials, in February, 1974 and May, 1974, resulted in a mistrial. In August of 1974, the petitioner, running low on financial resources and stamina to withstand the rigors of another jury trial, waived jury trial. Failing to appear on September 3, 1974, petitioner was cited for felony bond forfeiture. Returning to Kansas in late April of 1975, petitioner was arrested and appeared at the jury trial docket call on May 12, 1975. At this time, the Assistant District Attorney advised the Court that petitioner had previously waived jury trial. The Court then set the matter over to May 27, 1975 for appearance on the non-jury docket.

On May 14, 1975, petitioner filed a Motion for a Jury Trial and to set aside his jury waiver, asserting his right to a jury trial guaranteed him under the United States Constitution and the Constitution of the State of Kansas. (App. A, pg. 19) On May 23, 1975, the Motion was heard by the Court and denied. (App. A, pg. 1)

At the docket call of May 27, 1975, petitioner orally renewed his Motion for a Jury trial, which was denied. The trial to the Court on May 27, 1975, resulted in a mistrial on May 28, 1975.

In a hearing on a Motion for a Continuance on May 29, 1975, petitioner again renewed his Motion for a Jury Trial. (App. A, pg. 13) Again the Court denied it and forced the defendant immediately into the fourth trial of this case. In a trial to the Court, petitioner was convicted on May 30, 1975.

Petitioner duly perfected his appeal to the Supreme Court of the State of Kansas. Petitioner again asserted his right to a jury trial in his brief and upon oral argument. The Court handed down its opinion on November 6, 1976, affirming the trial court's conviction. (App. A, pg. 1)

Petitioner filed a Notice of Rehearing in the Supreme Court of the State of Kansas on January 3, 1977. The Court denied petitioner's Motion on January 26, 1977.

REASONS FOR GRANTING THE WRIT

Petitioner asserts that the trial court's refusal to grant him a jury trial was an abuse of its discretion and a denial of his right to a jury trial under the Sixth Amendment of the United States Constitution and, also, a denial of due pro-

cess under the Fourteenth Amendment. It appears this question has not heretofore been determined by this Court. This question, however, has been decided by several state courts. The guidelines set forth by the various courts to determine whether or not the trial court abused its discretion are the timeliness of the Motion and the inconvenience to the State.

In regards to timeliness, denial of a Motion to Withdraw a Jury Trial Waiver one day before trial has been held to be an abuse of the trial court's discretion. (*Cole v. State*, 277 A.2d 248 (Maryland, 1971); *Newton v. State*, 52 So.2d 488 (Mississippi, 1951)) Also, denial of a Motion to Withdraw a Jury Trial Waiver, one week before trial, has been held to be an abuse of discretion. (*People v. Osmon*, 15 Cal. Rptr. 263(1961); *Floyd v. State*, 90 So.2d 105 (Florida, 1956)).

In the instant case, petitioner filed his Motion on May 14, 1975, thirteen (13) days before the trial date and asked for an immediate hearing on the Motion. The Motion was heard May 23, 1975, nine days later, but still four days before the trial date. Insofar as timeliness is considered, the Court abused its discretion in denying petitioner's Motion

to Withdraw his Jury Waiver.

In regards to the inconvenience to the State, it was not sufficient to deny petitioner a right so fundamental as a jury trial. When petitioner was apprehended some eight months after he had waived a jury trial, his emotional and financial state had improved so that he was able to undergo the rigors of another jury trial. He had waived a jury trial in August of 1974 only after undergoing the mental and financial strain of two jury trials which resulted in mistrials and 38 court appearances. When petitioner was apprehended, his case was put on the jury trial docket. Petitioner and counsel both thought that petitioner was to receive a jury trial. The Court, however, chose to put petitioner's case on a non-jury docket. Any further delay that would have been caused in reinstating the matter to a jury trial docket, was due to the Court's own action.

The State argued that placing the matter back on the jury docket would delay the matter on into June when some of the State's witnesses would be unavailable due to vacation schedules. This, along with additional costs to the State, was the major point that the State asserted pertaining to inconvenience. The costs to the State should not be a

factor in determining whether or not a defendant should receive a jury trial. Certainly, conflicting vacation schedules should not outweigh a right so fundamental and inviolate as a jury trial. In the *Newton* case, in overruling the defendant's Motion to Withdraw his Jury Waiver, the trial court noted that the matter had come to trial months ago, that it had come to trial several times, and that it would be expensive to the State to further delay the case. Yet, the State Supreme Court overruled the trial court saying it had abused its discretion. Petitioner feels the circumstances surrounding the instant case are similar to those in *Newton* and that the trial court abused its discretion in denying his Motion to Withdraw his Jury Waiver.

The Supreme Court of the State of Kansas, in affirming the trial court's decision, noted that if petitioner's Motion was granted, the trial would be delayed for at least a month. The State Supreme Court erred in affirming the trial court's decision. At least one month's delay is not sufficient to deny petitioner so fundamental a right.

For the reasons set forth above, petitioner prays that a writ should issue.

Respectfully submitted,

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APPENDIX A

1) OPINION OF THE SUPREME COURT OF THE STATE OF KANSAS.

IN THE SUPREME COURT OF THE STATE OF KANSAS
STATE OF KANSAS, APPELLEE,)
v.) CASE NO. 48,045
LAWRENCE L. DAIGLE,)
APPELLANT.)

)

SYLLABUS BY THE COURT

The record on appeal is examined in a criminal action in which the defendant was convicted of possession of heroin and it is held that the district court did not err (1) in refusing to allow the defendant to withdraw his waiver of jury trial, (2) in refusing to grant a continuance, or (3) in permitting the prosecution to introduce evidence of a scientific test made after the trial had commenced.

Appeal from Sedgwick district court, division No. 5;
JAMES J. NOONE, judge. Opinion filed November 6, 1976.
Affirmed.

Edgar W. Dwire, of Malone, Dwire, Glover and Hobbs, of Wichita, argued the cause, and was on the brief for the appellant.

Stephen M. Joseph, assistant district attorney, argued the cause, and Curt T. Schneider, attorney general, and Keith Sanborn, district attorney, were with him on the brief for the appellee.

The opinion of the court was delivered by

PRAGER, J.:

This is a direct appeal in a criminal action in which the defendant-appellant, Lawrence L. Daigle, was convicted after a trial to the court of possession of heroin in violation of K.S.A. 1973 Supp. 65-4127a. The facts as disclosed at the trial were essentially as follows: During the morning hours of July 31, 1973, the defendant Daigle drove his motor vehicle to the home of a friend in Wichita. While there he entered the garage for the purpose of picking up certain personal property. The defendant was observed on the property by Beverly Beadles, a neighbor, who with good intentions called the police to report a suspicious person in the block. Beadles gave the police a description of defendant's automobile. The defendant left the premises and drove to the intersection of Washington and Pawnee Streets where he was stopped by Patrolman Ryder who was on the lookout for the described automobile. At Tyder's direction defendant drove off the street into the driveway of a furniture store adjacent to the intersection. Ryder suggested to defendant that he return to the home of his friend in order to clear up the prowler report. Defendant did so, and after a short discussion there he was released. Not long thereafter Patrolman Ryder was approached by Raymond Calvin at the intersection of Washington and Pawnee. Calvin informed Ryder that he had observed the defendant's car as it pulled into the driveway and saw a brown-paper bag flying from the direction of defendant's

car and landing on the grass near the area where Ryder had previously stopped the defendant's vehicle. Upon investigation Ryder discovered the paper sack on the ground and upon opening it found inside a syringe, five individually wrapped Trojan brand prophylactics, a torn piece of prophylactic wrapper, and a Trojan brand prophylactic box. Ryder opened the box and found one prophylactic containing a cimmanon-colored substance which was determined to be heroin. Ryder then observed the defendant in the vicinity of this same intersection. He proceeded to place the defendant under arrest for possession of heroin. A search of defendant's person by Patrolman Ryder yielded \$670.00 in cash, two silver measuring spoons, a billfold, and several individually wrapped Trojan brand prophylactics. Later that same day the defendant consented to a search of his car and his house. A search of defendant's house produced still more Trojan brand prophylactics, printed directions, another torn piece of prophylactic wrapper, and two syringes.

On December 18, 1973, an information was filed in the Sedgwick county district court charging defendant with possession of heroin. Thereafter the case eventually was tried four times. The first trial was before a jury in February of 1974 and resulted in a mistrial when the jury could not agree on a verdict. The second trial was before a jury in May 1974, and again the jury was unable to agree. On August 6, 1974, the defendant appeared in district court with his counsel at a jury trial docket call and voluntarily waived his right to a jury trial. The district administrative judge accepted the waiver and placed the case on the nonjury trial docket for September 3, 1974. The defendant failed to appear for trial on the date set. His bond was forfeited and a warrant for his arrest was issued.

Eight months later on May 1, 1975, the defendant was arrested. The district administrative judge by mistake placed the defendant's case on the May 12 jury trial docket. When the case was called on that date, the defendant requested a continuance until June 2. At that time the prosecutor reminded the court of the defendant's prior waiver of jury trial. The court then ordered the case to be set on the non-jury trial docket and continued until May 27. On May 12 the defendant did not object to removing the case from

the jury trial docket nor did he request that he be allowed to withdraw his prior jury waiver. Two days later on May 14, 1975, the defendant filed a motion to withdraw his waiver of trial by jury and requested a jury trial. The motion was not heard until May 23 because of compliance with supreme court notice rules and Sedgwick district court procedures. At the hearing on his motion the defendant offered no specific reasons for seeking to withdraw his waiver. The state objected thereto on the grounds that substantial delay would result if the motion was granted. The prosecutor pointed out that some witnesses would not be available in June. The district administrative judge stated that the case had been set on the jury docket by mistake. The judge concluded that the trial would be substantially delayed if not commenced on the day when it was scheduled for non-jury trial and denied the motion.

The case was called on the nonjury docket on May 27, 1975, and trial commenced that day. On May 28 a mistrial was declared before the conclusion of the evidence, and the case was set for nonjury trial on the following morning. At the conclusion of the fourth trial the district court found the defendant guilty of possession of heroin and this appeal followed.

The only real issue to be determined at any of the trials was whether the defendant had possession of the brown-paper sack and the heroin contained therein prior to the time it was discovered by the police officer on the ground near the place where defendant was stopped by Patrolman Ryder. At the two jury trials the evidence was disputed. Mr. Calvin testified on behalf of the state that he observed officer Ryder directing defendant to pull into the driveway near the intersection and that as the defendant did so a brown-paper sack flew from the direction of the defendant's car and landed in the grass near the street. In his defense the defendant offered the testimony of Mr. and Mrs. Jack Hanson, who at that time resided in Lawton, Oklahoma. They testified in substance that during the mid-morning hours of July 31, 1973, at the intersection of Washington Street and Pawnee Street in Wichita, they observed two young men pitch what appeared to be a brown-paper sack in the grassy area near the intersection. The testimony of the Hansons raised a *bona fide* issue for

the jury as to whether the defendant Daigle had ever had possession of the sack.

At the fourth trial, in which the defendant was convicted, the state at the last minute came up with some evidence which was extremely damaging to the defense. During the fourth trial the assistant district attorney, James E. Rumsey, noticed a similarity between the torn edge of the piece of prophylactic wrapper found in the sack containing the heroin and the edge of the piece of prophylactic wrapper found at the defendant's house when it was searched on the same day. At Rumsey's request the two pieces of wrapper were examined during the lunch hour under a comparison microscope by Linda Voss, a police forensic chemist. Following the noon recess Mrs. Voss testified that she had compared the two pieces of prophylactic wrapper and that the torn edges matched perfectly, leading to the inescapable conclusion that they had previously been a part of the same piece of paper. Mrs. Voss also identified two photographs which demonstrated the matching of the two pieces of paper, and they were admitted into evidence by the trial court. This testimony was never rebutted by the defendant and undoubtedly resulted in the defendant's conviction of possession of heroin. It is difficult to see how the court could have reached any other reasonable conclusion.

On this appeal the defendant raises four points of claimed trial error. Points No. 1 and No. 2 concern the refusal of the district court to grant the defendant a jury trial. As his first point the defendant maintains that the trial court erred in its failure to grant the defendant a jury trial after the case had been placed on the jury trial docket of May 12, 1975. It is the defendant's position that, although the defendant had previously waived trial by jury prior to his jumping bond in September of 1974, once the trial court put his case back on the jury trial docket he was entitled to a jury trial as a matter of right. The record discloses that the defendant waived jury trial on August 6, 1974, approximately nine months prior to the time he was apprehended and the case was set on the jury trial docket. Furthermore on the date set the defendant did not announce ready for trial but asked for another continuance and did not request leave to withdraw his waiver of jury trial. Nor did he object

to the setting of the case on the nonjury trial docket. As the district administrative judge observed on May 23, 1974, he had inadvertently set the defendant's case on the jury trial docket after defendant's apprehension. In our judgment it was not error under the circumstances for the trial judge to remove the case from the jury trial docket and return it to its proper place on the nonjury trial docket.

As his second point on appeal the defendant contends that the trial court erred in its refusal to allow the defendant to withdraw his waiver of a jury trial. The record is clear that the defendant in August 1974, voluntarily and understandingly waived trial by jury. Thereafter his waiver could not be withdrawn except in the discretion of the trial court. (*State v. Blanton*, 203 Kan. 81, 453 P.2d 30). Among the factors to be considered by a trial court confronted by such a motion are the timeliness of the motion to withdraw the waiver and whether a delay of trial or serious inconvenience of witnesses would result from granting such motion. At the hearing on the motion for withdrawal of jury waiver in this case evidence was presented by the state which reasonably showed that substantial inconvenience would occur if the motion was granted. Vacations were apparently coming up and some witnesses would not be available at a later date in the near future. It was obvious that if the motion was granted the trial would be delayed for at least a month. Furthermore, on the hearing of his motion the defendant gave no specific reason for wanting to withdraw his waiver. He does not claim that the trial judge was prejudiced against him nor has any prejudice been shown. Considering the record in its entirety we have concluded that the defendant has failed to show that the trial court abused its discretion by refusing to allow the defendant to withdraw his waiver of jury trial.

The defendant's third point is that the trial court erred in its refusal to grant the defendant a continuance so that two witnesses for the defense, Mr. and Mrs. Jack Hanson, could be subpoenaed. These are the two witnesses noted above who testified on behalf of the defendant at two prior trials. Transcripts of their testimony at previous trials were available and were admitted into evidence in this case. The defendant's position is that the live testimony of these witnesses was vital and that the defendant was prejudiced by

the refusal of the trial court to grant a continuance to obtain their testimony in person. It is the state's position that the trial court did not abuse its discretion in refusing to grant a continuance since the witnesses were residing in the state of Alabama which has not adopted the uniform act to secure attendance of witnesses from without the state. (K.S.A. 22-4201, *et seq.*) The state contended that since Alabama was not a party to the uniform act the presence of the witnesses could not be compelled and, if the trial was continued, the defendant could not guarantee the presence of these witnesses. Continuances may, of course, be granted either party for good cause shown. (K.S.A. 22-3401.) The granting of a continuance is a matter within the sound discretion of the trial court. In seeking a continuance due to the absence of a witness, the party must show that due diligence has been exercised to procure the witness's testimony. A continuance will not be granted merely upon an assertion that the party relied upon the promises of witnesses that they would be present and testify. (*State v. Williamson*, 210 Kan. 501, 502 P.2d 777.) In this case the defendant was not even relying upon promises from his witnesses. He was merely attempting to subpoena witnesses from out-of-state whose presence he could not compel. Counsel for the defendant was not able to advise the trial court that the Hansons would leave Alabama and appear at the trial if the case was continued. The defendant's motion was nothing more than an attempt to gain time to see if he could obtain from the Hansons a promise to appear in court at some later date. Here the trial court, prior to overruling the motion for continuance, was advised that a transcript of the witnesses' testimony was available and could be introduced into evidence by the defendant. We have concluded that under all the circumstances the trial court properly exercised its discretion and that its refusal to grant a continuance was not an abuse of discretion.

The defendant's fourth and final point is that the trial court erred in allowing the state to introduce new prejudicial evidence after the commencement of the trial in violation of a discovery order, and, once admitting the evidence, the trial court erred in its failure to grant the defendant a sufficient continuance to allow him to obtain independent expert analysis concerning the new evidence. The evidence in question was the "fracture test" conducted by the foren-

sic chemist, Linda Voss, in which she compared the fragment of the prophylactic wrapper found in the brown-paper sack with the piece found in the defendant's house and concluded that the torn edges of the pieces matched perfectly. It is clear that the state had not conducted this particular test until the lunch recess of the first day of the fourth trial. The trial court held that the state was not precluded from continuing its investigation even after trial had commenced and overruled the objection. It is undisputed that following completion of the test, counsel for the defendant was promptly advised of the results thereof. Furthermore, defendant's counsel was permitted to interview the forensic chemist prior to her testifying and was given the opportunity to examine the two photographs which documented her visual observations through the comparison microscope. The trial court also ordered that the fragments be made available to any witness designated by the defendant and recessed the case until the following day so that the defendant might obtain an expert to examine the fragments. We have concluded that the state did not violate the previous discovery order of the trial court, since the trial court required the results of the test to be made available to defendant's counsel promptly after the test had been completed.

The defendant insisted upon the right to be granted a continuance to search for out-of-state "fracture experts" who might testify on defendant's behalf. The trial court observed that Mrs. Voss's testimony consisted only of a comparison of two pieces of paper observed under a microscope and that the defendant did not need the assistance of an out-of-state fracture expert. In our judgment the trial court did not abuse its discretion in permitting the state to introduce the testimony of Linda Voss into evidence and in its refusal to grant an extended continuance in the case. The defendant has not shown that he was prejudiced by the trial court's order. Following the completion of the trial and the finding of guilty, the defendant had an opportunity to have tests made on the fragments and to present them to the trial court at a hearing on a motion for a new trial. Counsel for defendant did not show to the trial court, nor has he shown to this court, that he has evidence available to dispute the conclusion of the state's expert witness that the fragments of prophylactic wrapper paper were at one time a part of

the same piece of paper. We are certain that if such expert testimony was available to defendant to dispute the testimony of the state's expert witness, such testimony would have been presented to the trial court on a motion for a new trial.

For the reasons set forth above the judgment of the district court is affirmed.

2) OPINION OF THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS, OVERRULING THE PETITIONER'S MOTION FOR WITHDRAWAL OF A JURY WAIVER.

IN THE DISTRICT COURT OF SEDGWICK COUNTY,
KANSAS

STATE OF KANSAS, Plaintiff,)
vs.) CASE NO. CR 9509
LAWRENCE L. DAIGLE, Defendant.) DIVISION NO. 2
)

**TRANSCRIPT OF HEARING ON DEFENDANT'S
MOTIONS
TO REDUCE BOND AND SET ASIDE A JURY WAIVER**

BE IT REMEMBERED That on this 23rd day of May, 1975, the same being a regular judicial day of the District Court in and for the County of Sedgwick, State of Kansas, the above-entitled cause comes on for the hearing before the Honorable Howard C. Kline, Judge of Division No. 2 of said Court:

The State of Kansas, Plaintiff, appears by and through Mr. James Rumsey, Assistant District Attorney for Sedgwick County, Kansas.

The Defendant, Lawrence Daigle, appears in person and by and through his attorney, Mr. Richard Hilton, Wichita, Kansas.

THE COURT: Is this on a Motion to Reduce Bond, is it not?

MR. HILTON: There are two motions to reduce bond and also to set aside a jury waiver.

I would like to take up first, the matter of the jury waiver.

THE COURT: Fine.

MR. HILTON: In this case, if you recall, Mr. Daigle was

returned to this jurisdiction, or was apprehended here, about three or four weeks ago. You had him remanded on an alias warrant. At that time, you then had me up—I think I was in a Motion in Division One to ascertain whether or not I still represented him. After we decided, we came back out. It was my understanding that when you arraigned him, that you had set it on the jury trial docket. And you had again informed me, after I had notified you that I was going to remain on the case, you had it set on the jury trial docket for May the 12th; at which time, we appeared.

Now, prior to this, if you recall, this case lasted over about a year and we went to trial. The first trial was in Division Number 8, Judge Nicholas Klein; and it ended in a mistrial. The second case was tried before the Honorable Tom Raum in Division Number 7; and it went through and it ended in a mistrial again, by reason of a hung jury.

THE COURT: Was that also true in Judge Nicholas Klein's Court?

MR. HILTON: No, Your Honor. It was a mistrial before it was submitted to the jury.

All right. Then, I believe in August or July of 1974, the Defendant waived jury and was set on the September 3rd,

the non-jury docket date, which he failed to appear. Now, when he came back, I thought after I conferred with him, he told me he wanted a jury trial, I thought evidently he had requested one of you, because it was my understanding that you set it back on the jury trial docket.

THE COURT: I set it back on for trial. I didn't realize at the time that I set the date, that he had waived a jury prior to then; and I was later reminded that he had waived a jury back before the September setting when he wasn't here.

MR. HILTON: Well, that May 12th was a jury trial docket; and at that time, I had answered to the Court that I wasn't ready for jury trial, that he was securing additional counsel.

In the courtroom today, he — Mr. Percy Foreman (Phonetic) from Houston is present. He is conferring with Mr. Daigle on the case.

THE COURT: But, the jury has been waived, and I am not going to put it back on the jury trial docket.

MR. HILTON: I have some case citations.

THE COURT: Fine.

MR. HILTON: There is a case — of course, it was a Kansas — 203 KAN. I had the specific report — It says: 203

KAN 81, State of Kansas versus Blaton, 453 P.2d 30, in that they recite the whole list of cases; and which the Court says and I quote: "On the other hand, where the request to withdraw the waiver of a jury trial is made sufficiently in advance of trial so as not to interfere with the orderly administration of the business of the Court or to result in unnecessary delay or inconvenience to witnesses or to the prejudice of the other party to the action, the Court should exercise its discretion to allow the moving party the jury trial he seeks. Certainly, when dealing with a right so fundamental as to be characterized by our Constitution as one which should 'remain inviolate,' the Court should only deny the privilege thus accorded a defendant charged with crime to a trial by his peers where some adverse consequence will flow from his change of mind."

The Court should see by the file that after I was notified on May 12th that it was removed from not to be tried that day — jury trial setting — but to be set on non-jury trial docket for May 27th. I think, two days after that, the file should reflect on May 14th I filed this Motion, which you are hearing today; and I asked for it to be heard immediately if possible.

THE COURT: As I understand it, this man waived a jury months and months ago.

MR. HILTON: That's true.

THE COURT: When it was set for jury trial, he voluntarily absented himself from the Court, from the jurisdiction. That was in September, if I remember right; and then they arrested him here in April or May. I guess it was last of April or part of May.

MR. HILTON: About three or four weeks ago, as I recall.

THE COURT: What do you say, Jim?

MR. RUMSEY: Your Honor, the most recent case in our case is: State of Kansas versus Lawrence. (phonetic) There is a decision based largely upon this, set forth the rule that there is no right to have a decision to waive a jury being reversed. It's in the Court's discretion. And the case law parallels the criminal justice standards that have been adopted and approved by our State's Court. And they talk about the inconvenience; and I think there is a great deal of inconvenience that has occurred in this case to the State. First of all, we issued subpoenas on the 26th day of August, 1974 for jury trial. Then, we issued subpoenas again the

next week, 3rd of September, for non-jury trial. We had to put forth the effort and the cost of getting those subpoenas served. Some of the witnesses we had subpoenaed were from out-of-state in the case; I believe, Oklahoma and also other parts of our State on those two instances.

Furthermore, at this point in time, if the case were given a jury setting there would be a great deal of delay, because some of our witnesses are not going to be available during the month of June. We are running into some vacation schedules at this point of time.

Furthermore, there are going to be some excess of seventy or eighty cases that are going to be for arraignment next week, which is going to further block up our docket system. It's essentially going to screw up the works.

And, I don't think there is any evidence, at all, that he did not knowingly waive his jury.

THE COURT: This case is set for next Tuesday?

MR. RUMSEY: Yes.

THE COURT: We are going to try it next Tuesday.

MR. HILTON: Do you have the citation on that?

MR. RUMSEY: 216 KAN 31.

MR. HILTON: Even in all these cases, the Blanton

(phonetic) case, these were the cases that they said and reviewed the matter — They said that was the case that they had on the jury docket on May 12th. Then, they walk up there and then change their minds. All those cases were the same day.

In this case, I want the record clear that on May 12th, we appeared here on a jury trial docket. And then on May 14th — Well, it will reflect two days later, I filed my Motion to Reinstate it.

I say, why talk about any inconvenience, this man was put to two jury trials in less than — I think — eight months. So, he had a great deal of duress. The funds were exhausted. He was emotionally exhausted, along with his counsel, I think.

It's a situation with where I think he has a constitutional right. They have the witness problem about cost. The United States Supreme Court said the cost is no factor.

THE COURT: I'm not interested in the cost. I am interested in the fact that we have it set for this coming Tuesday, three or four days from now, for trial; and the witnesses have been subpoenaed, and we are going to try it.

3) OPINION OF THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS, OVERRULING PETITIONER'S SECOND MOTION FOR WITHDRAWAL OF A JURY WAIVER.

IN THE DISTRICT COURT OF SEDGWICK COUNTY,
KANSAS

STATE OF KANSAS, Plaintiff,)
vs.) CASE NO. CR 9509
LAWRENCE L. DAIGLE, Defendant.) DIVISION NO. 2

)

TRANSCRIPT OF HEARING

BE IT REMEMBERED That on this 29th day of May, 1975, the same being a regular judicial day of the District Court in and for the County of Sedgwick, State of Kansas, the above-entitled cause comes on for the hearing before the Honorable Howard C. Kline, Judge of Division No. 2 of said Court:

The State of Kansas, Plaintiff, appears by and through Mr. James Rumsey, Assistant District Attorney for Sedgwick County, Kansas.

The defendant, Lawrence Daigle, appears in person and be and through his attorney, Mr. Richard Hilton, Wichita, Kansas.

THE COURT: Case CR 9509 — State of Kansas versus Lawrence Daigle. What kind of a Motion do you have, Mr. Hilton?

MR. HILTON: May it please the Court, I wanted to re-raise for one, the Motion to set aside the jury waiver, and ask for a jury trial. The new fact that you hadn't considered before, now we have gone to trial this week, Tuesday and Wednesday, and a mistrial has been declared. Therefore, the witnesses are not inconvenienced.

I — Secondly, I would re-raise the Motion for continuance that I filed Tuesday, which was heard, which is in the file. There is also an accompanying affidavit. I had a subpoena issued out of the Clerk's Office to the two previous defense witnesses in Oklahoma. It was returned by the Sheriff, Commanche County. I was informed at 12:10 on the 27th day of May that return by the Sheriff had been made and that both witnesses had — are now residing and they have gave the address of Route 4, Box 1, Dothan, Alabama.

I wish, now, since it's a new trial, I ask time to file additional subpoenas to the two, address: Route 4, Box 1, Dothan, Alabama. Alabama is not a signature to our uniform witness production act. Who I was on the telephone

with, was the Assistant Attorney General of Alabama, and he confirmed they were not a member of that compact act. He suggested if we would tender the expenses to the witnesses to a local — some local counsel down there, that they would use whatever means they could to see that the witnesses are brought back up here.

THE COURT: Can't control it. There is no way we can force them to be here. You might contact them and see if you can sent them expenses and see if they come.

MR. HILTON: Last night, Your Honor, I called the information down there in Delhart (phonetic), Texas, and there is a Jack Williams. They didn't have a box number. They don't list their addresses that way. There is a Jack Williams of Delphos (phonetic) Kansas, but it was an unlisted number — not Williams, but Hanson, Jack Hanson; but it was an unlisted number.

Therefore, since it's a new trial, I think I ought to have a chance to refile, issue by subpoenas.

THE COURT: Mr. Rumsey.

MR. RUMSEY: First of all, the testimony of those two witnesses was transcribed at the trial that was had in May of 1974 in Division 7, and was introduced in testimony — or

begun to be introduced in testimony yesterday in Division 6. Those transcripts of those two witness's testimony is available.

Since Alabama is not a signatory to the uniform act, they are legally unavailable under our law. And the law provides that when a witness is unavailable, that their transcript or deposition may be substituted.

THE COURT: The State will not object to the introduction of the transcripts?

MR. RUMSEY: Not at all. As a matter of fact, we went to the expense of having them prepared.

THE COURT: That isn't what I asked.

MR. RUMSEY: We don't object, not at all.

THE COURT: In view of that, I think you can use the transcript, Mr. Hilton, of the testimony given at the prior trial. In the event that you can't contact them and they can't come up voluntarily. So, we can go ahead and go to trial.

MR. HILTON: You are still overruling my Motion for a jury trial?

THE COURT: Yes.

MR. HILTON: Very well.

THE COURT: I ruled on that before.

MR. HILTON: There was a new fact. We now have a mistrial.

THE COURT: I still want to get it tried and get it over with.

4) JOURNAL ENTRY OF THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS.

IN THE DISTRICT COURT OF SEDGWICK COUNTY,
KANSAS

STATE OF KANSAS, Plaintiff,)
CASE NO. CR 9509)
LAWRENCE L. DAIGLE, Defendant.) DIVISION NO. 5

)

JOURNAL ENTRY OF JUDGMENT

On this 29th day of May, 1975, this case comes on regularly for trial to the Court, with the consent of the Court a jury having been waived by the defendant and the State on the Information charging him with Possession of Heroin. Defendant was heretofore bound over for trial by the Honorable Tyler C. Lockett, Judge of the Court of Common Pleas, Wichita, Kansas, and was heretofore served a copy of the Information. The State of Kansas appears by its attorney, Michael H. Morgan, Assistant District Attorney and the defendant appears in person and by his attorney, Richard L. Hilton.

Thereafter on the 30th day of May, 1975, the Court after hearing the evidence and arguments of counsel and being duly advised in the premises, finds the defendant guilty as

charged. The Court thereupon continues this case for hearing on defendant's motion for new trial and/or sentencing.

Thereafter on the 20th day of June, 1975, all parties reappear. The State's motion for imposition of the Habitual Criminal Act is by the Court denied and the Court finding that defendant waived his right to file a motion for new trial, inquires of the defendant if he has any legal cause to show why judgment of sentence should not be pronounced against him; the defendant failing to show any such cause and none appearing, there being none, the Court proceeds to pronounce judgment of sentence against the defendant as follows:

IT IS THE SENTENCE OF THIS COURT AND IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant is hereby committed to the custody of the Secretary of Corrections for imprisonment for a period of not less than five (5) years nor more than twenty (20) years on the charge of Possession of Heroin, contrary to K.S.A. 65-4101, 65-4105, 65-4124, 1973 Session Laws, Chapter 259, Section 1 and in accordance with K.S.A. 21-4501(c).

IT IS FURTHER ORDERED that for the purpose of computing the defendant's sentence and his parole eligibility and conditional release dates thereunder, that such sentence is to be computed from May 1, 1975, to give defendant credit for time actually spent in jail pending the disposition of his case.

IT IS FURTHER ORDERED that the Clerk of this Court deliver two (2) certified copies of this judgment and commitment to the Sheriff of Sedgwick County, Kansas, or one of his duly authorized deputies. It is further ordered that such certified copies serve as the commitment of the defendant and said Sheriff or authorized deputy is ordered at his earliest convenience to deliver the above named defendant to the custody of the Secretary of Corrections for imprisonment to carry out the sentence imposed upon him by this Court and make due return thereof.

IT IS SO ORDERED.

/s/ HONORABLE JAMES J. NOONE
PRESIDING JUDGE AT TRIAL

5) JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS, DENYING PETITIONER'S MOTION FOR RE-HEARING.

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS, APPELLEE,)
v.) CASE NO. 48,045
LAWRENCE L. DAIGLE,)
APPELLANT.)

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing by Appellant is considered and DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date January 26, 1977

6) MOTION FOR AN ORDER REQUESTING A JURY TRIAL FILED MAY 14, 1975.

IN THE DISTRICT COURT OF SEDGWICK COUNTY,
KANSAS

STATE OF KANSAS, Plaintiff,)
)
vs.) CASE NO. CR 9509
)
LAWRENCE L. DAIGLE, Defendant.) DIVISION NO. 2
)

MOTION
(Filed May 14, 1975)

COMES NOW the Defendant, Lawrence L. Daigle, and moves the Court for an order requesting a jury trial. The jury was waived by the Defendant in August of 1974 under duress. The Defendant had stood trial for a year and stood to two jury trials, his economic situation had been depleted and now the Defendant requests a jury trial again of his cause under the rights guaranteed him under the United States Constitution and the Constitution of the State of Kansas.

/s/ Richard L. Hilton
Attorney for Defendant

APPEARANCE FORM

SUPREME COURT OF THE UNITED
STATES

No. _____, October Term, 1976

LAWRENCE L. DAIGLE, STATE OF KANSAS,

Petitioner.

Respondent.

The Clerk will enter my appearance as Counsel for the Petitioner.

Edgar Wm. Dwire

EDGAR WM. DWIRE
305 W. Central
Wichita, Kansas 67202

AFFIDAVIT OF SERVICE

STATE OF KANSAS)
COUNTY OF SEDGWICK) ss:
)

I, Edgar Wm. Dwire, depose and say that I am an attorney in the office of Malone, Dwire, Hobbs & Jones, attorneys of record for Lawrence L. Daigle, the petitioner herein, and that on February 3, 1977, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the attached Petition for Writ of Certiorari on each of the parties required to be served herein, as follows:

On the State of Kansas, the respondent herein, by mailing the copies in a fully addressed envelope, with first class postage prepaid, to Stephen M. Joseph, counsel of record for said respondent, State of Kansas, at his office at the District Attorney's Office, Sedgwick County Courthouse, Wichita, Kansas, 67203.

All parties required to be served have been served.

Edgar Wm. Dwire
EDGAR WM. DWIRE

Subscribed and sworn to before me on FEB 3,
1977.



My Commission Expires:

MAY 30, 1979

Earl H. Hobbs, Jr.
Notary Public